LAI KUIT SEONG v. PUBLIC PROSECUTOR

[F.C. (Ong Hock Thye C.J. (Malaya), Suffian F.J. and Abdul Aziz J.) January 27, 1969]

[Ipoh—Federal Court Criminal Reference No. X3 of 1968]

Road Traffic — Dangerous, reckless or careless driving — Onus of proof — Whether the doctrine of res ipsa loquitur applies in a criminal trial — Road Traffic Ordinance, 1958, ss. 34A, 35 & 36.

The question raised in this reference was whether the doctrine of *res ipsa loquitur* is available to the prosecution to enable it to discharge the onus of proof resting upon it in cases involving charges under section 34A or 35 or 36 of the Road Traffic Ordinance, 1958, if in the circumstances of the case the trial magistrate cannot properly find or infer from the evidence adduced the facts sustaining the relevant charges.

Held: the maxim *res ipsa loquitur* has no application in criminal cases.

Obiter: The doctrine of *res ipsa loquitur* arises only in connection with the tort of negligence and does not apply where the cause of the accident is known. Secondly, the *res* speaks because, and only because, where the accident stands unexplained, the known facts and circumstances, however meagre, may be such that want of reasonable care is safely attributable to the person but for whose negligence the accident could not have happened. In other words, the circumstances are eloquent testimony *per se* of negligence. Thirdly, and conversely, *res ipsa loquitur* cannot be relied on where the *res* is ambivalent. Fourthly, in criminal proceedings, where the heavier onus of proof rests on the prosecution and the facts proved must be sufficient to support the charge beyond reasonable doubt, the occasion can never arise where the facts require to be bolstered up by invocation of the doctrine.

[**Editorial Note:** The attention of the court did not appear to have been drawn to the case of *Ramasamy* v. *R.* [1955] M.L.J. 95 where Spenser Wilkinson J. held that it is wrong to apply the doctrine of *res ipsa loquitur* in criminal cases in which negligence must be positively proved.]

Cases referred to:—

(1) *Simpson* v. *London, Midland & Scottish Rly. Co.* [1931] A.C. 351, 357.

(2) *Mackinnon* v. *Miller* (1909), S.C. 373.

(3) *Qualcast (Wolverhampton) Ltd.* v. *Haynes* [1959] 2 W.L.R. 510, 515, 518.

(4) *Barkway* v. *South Wales Transport Co. Ltd.* [1950] 1 All E.R. 392, 395.

(5) *Doughty* v. *Turner Manufacturing Co. Ltd.* [1964] 2 W.L.R. 240, 248.

FEDERAL COURT.

P.P. Dharmananda for the applicant.

Ajaib Singh (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Ong Hock Thye C.J. (Malaya): The question of law reserved for the decision of this court by the judge at Ipoh, under section 66 of the Courts of Judicature Act, 1964, was the sequel to an appeal from the magistrate's court at Taiping, and is as follows —

"Whether the doctrine of *res ipsa loquitur* is available to the prosecution to enable it to discharge the onus of proof resting upon it in cases involving charges under sections 34A or 35 or 36 of the Road Traffic Ordinance, 1958, if in the circumstances of the case the trial magistrate cannot properly find or infer from the evidence adduced the facts sustaining the relevant charges."

The reference was made on the application of counsel for the appellant but, with respect, I think it should not have been granted. The maxim *res ipsa loquitur* simply means that, in certain circumstances, one fact *per se* may afford sufficient *prima facie* evidence from which the inference of another fact may properly and reasonably be drawn, unless and until the contrary is shown.

In the instant case the appellant had been summoned on a charge of driving a motor-bus without due care and attention, contrary to section 36(a) and punishable under section 146 (1)(2) of the Road Traffic Ordinance, 1958. The prosecution based its case mainly, if not solely, on the fact that the vehicle came to grief some 66 yards after it had negotiated a sharp bend, where it was found by the investigating officer lying on its side near the drain. At the close of the prosecution the learned magistrate accepted counsel's submission that *res ipsa loquitur* had no application in criminal cases and on that ground dismissed the charge without calling on the defence. The public prosecutor appealed against this decision and his appeal was allowed on the facts, since a vehicle does not ordinarily overturn after taking any bend, sharp or otherwise. Counsel then applied for the question above set out to be referred.

In my view the phrasing of the question itself shows that the maxim seemed to have been misunderstood: "if, in the circumstances of the case, the trial magistrate cannot properly find or infer from the evidence adduced the facts sustaining the relevant charges", how can *res ipsa loquitur* be raised? The *res* must speak for itself. If it does not, the maxim means nothing at all and cannot be invoked to fill a gap or supply a missing link in the evidence. The answer, therefore, is implicit in the question itself. Before us both counsel were agreed — we think rightly — that the maxim has no application at all in criminal cases.

The judge, however, had taken great pains, out of deference to learned counsel, to refer to five of the cases cited to him. With respect, it was not at all necessary to do so since he found them quite irrelevant. In this connection I am reminded of what Viscount Dunedin said in *Simpson* v. *London, Midland & Scottish Rly. Co.*:—(1)

"It is no use trying to decide a case simply by looking at decided cases and then inquiring which case most resembles the present on the facts. Decided cases are only useful so far as they lay down principles, and then, to quote what I said myself in a case which I fear I shall often have to refer to (*Mackinnon* v.

Miller (2)), 'each case must be dealt with and decided on its own circumstances, and inferences may be drawn from circumstances just as much as results may be arrived at from direct testimony'."

Again, in *Qualcast (Wolverhampton) Ltd.* v. *Haynes*,(3) a case on employers' liability and negligence, Lord Keith of Avonholm said:—

"In the sphere of negligence where circumstances are so infinite in their variety it is rarely, if ever, that one case can be a binding authority for another."

The same views were expressed by Lord Somervell of Harrow, thus:—

"A judge naturally gives reasons for the conclusion formerly arrived at by a jury without reasons. It may sometimes be difficult to draw the line, but if the reasons given by a judge for arriving at the conclusion previously reached by a jury are to be treated as 'law' and citable, the precedent system will die from a surfeit of authorities."

The learned judge was, therefore, quite right to consider the facts, instead of the so-called authorities, in coming to his decision.

Of the doctrine of *res ipsa loquitur* it may be useful to sum up as follows. First, it arises only in connection with the tort of negligence and does not apply where the cause of the accident is known: (see *Barkway* v. *South Wales Transport Co. Ltd.*(4)). Secondly, the *res* speaks because, and only because, where the accident stands unexplained, the known facts and circumstances, however meagre, may be such that want of reasonable care is safely attributable to the person but for whose negligence the accident could not have happened. In other words, the circumstances are eloquent testimony *per se* of negligence. Thirdly, and conversely *res ipsa loquitur* cannot be relied on where the *res* is ambivalent. Fourthly, in criminal proceedings, where the heavier onus of proof rests on the prosecution and the facts proved must be sufficient to support the charge beyond reasonable doubt, the occasion can never arise where the facts require to be bolstered up by invocation of the doctrine. There is no mystique in the application of *res ipsa loquitur* to proof of negligence. As Diplock L.J. said in *Doughty* v. *Turner Manufacturing Co. Ltd.*:—(5)

"Thtre is no room today for mystique in the law of negligence. It is the application of common morality and common sense to the activities of the common man."

To conclude, in the instant case, the appellant's statement in the police report, which was produced by the prosecution, attributed this accident to a cow or bullock suddenly crossing the road in the path of his vehicle. What had to be decided, therefore, was purely a question of fact, about which we say no more since the learned magistrate had been directed to call on the defence.

Question answered.

Solicitors: *Dharmananda & Co.*

NEW ZEALAND INSURANCE CO. LTD. v. SINNADORAI

[F.C. (Ong Hock Thye C.J. (Malaya), Suffian F.J., Abdul Aziz J.) January 27, 1969]

[Ipoh — Federal Court Civil Appeal No. X49 of 1968]

Arbitration — Insurance policy providing for arbitration — Stay of proceedings — Arbitration Ordinance, 1950, s. 5.

Insurance — Judgment obtained by passenger against insured — Liability of insurers to satisfy judgment — Whether the passenger bound by arbitration clause.

Road Traffic Ordinance, 1958, ss. 75, 80 and 81.

A motor vehicle driven by one Idris (hereinafter called "the insured") was involved in an accident. The insured died. The plaintiff/respondent who was a passenger in that vehicle sustained injuries. She obtained judgment against the estate of the insured and sought to enforce it against the defendants/appellants, who had issued a policy of insurance to the insured in respect of the user of his vehicle. Under the terms of the policy, the defendants/appellants undertook to cover the insured against claims by passengers with the usual provision for arbitration. The defendants applied for a stay of proceedings under section 5 of the Arbitration Ordinance, 1950. The High Court dismissed the application ([1968] 2 M.L.J. 70). The defendants appealed.

Held, allowing the appeal: (1) section 81(1) of the Road Traffic Ordinance is only applicable in cases where the question of the insured's insolvency arises. Where such a question does not arise the rights of a third party must be based on section 80(1). The respondent being a passenger in a private vehicle she was disentitled from relying on section 80(1) which only confers statutory benefits in cases where third party cover is made compulsory;

(2) since the respondent's only remedy was through subrogation she was bound by the arbitration clause, being a person "claiming through or under" the insured. The appellants accordingly were entitled to a stay of proceedings under the Arbitration Ordinance.

FEDERAL COURT.

P.P. Dharmananda for the appellants.

N. Sharma for the respondent.

Cur. Adv. Vult.

Ong Hock Thye C.J. (Malaya): Both parties to this appeal are dissatisfied with the judgment, delivered on June 12, 1968 by the High Court at Ipoh, dismissing an application, made by the appellants under section 5 of the Arbitration Ordinance 1950, to stay an action brought by the respondent claiming payment on a judgment which she looked to them to satisfy under the provisions of Part IV of the Road Traffic Ordinance, 1958.

The case history may be set out in a few words. The respondent was a passenger in a motor-car driven by one Idris (who was "the insured" under a policy then in force issued by the appellants covering third party risks) when an accident occurred resulting in death to Idris